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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of

DAVID A. RINGER

ASF BROADCASTING CORPORATION

WILBURN INDUSTRIES, INC.

KYONG JA MATCHAK

SHELLEE F. DAVIS

WESTERVILLE BROADCASTING
COMPANY LIMITED PARTNERSHIP

OHIO RADIO ASSOCIATES, INC.

MM Docket No. 93-107

File No. BPH-911230MA

File No. BPH-911230MB

File No. BPH-911230MC

File No. BPH-911230MF

File No. BPH-911231MA

File No. BPH-911231MB

File No. BPH-911231MC

For Construction Permit for an FM
Station on Channel 280A in
Westerville, Ohio

To: Administrative Law Judge
Walter C. Miller

**OPPOSITION TO
PETITION TO ENLARGE**

Wilburn Industries, Inc. ("Wilburn"), by its attorneys,
hereby submits its Opposition to the "Motion to Enlarge Issues"
filed by Ohio Radio Associates, Inc. ("ORA") on May 17, 1993. In
support thereof, the following is stated:

ORA's Motion contends that the presiding Judge should add
two qualifying issues against Wilburn, to determine: (1) whether
Wilburn's application violates Section 73.315 of the Commission's
Rules regarding city-grade coverage of the community of license,
and (2) whether Wilburn's application violates Section 73.207 of

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the Rules regarding spacings between FM broadcast stations. As will be shown below, ORA's Motion should be denied as entirely spurious.

1. City-Grade Coverage of Westerville

As acknowledged by ORA, the Commission has long held that the requirements of Section 73.315, which provides that a station's must serve the licensed community with at least a 3.16 mV/m ("city-grade") signal, are satisfied if 80% or more of the community lies within the station's city-grade contour. In such circumstances, no waiver of the Rule is required and the applicant may simply denote in its application that the Rule has been satisfied. Where, as in the case of Wilburn, 100% of the community is not encompassed by the proposed city-grade contour and the application expressly notes that 100% coverage will not be achieved, the applicant's certification that its proposal complies with the Rule therefore constitutes an implicit representation that at least 80% of the community is so encompassed. No further showing is called for by the application or by Commission precedent.

The Wilburn application, showing that a small portion of Westerville does not lie within its computed city-grade contour and representing that it will satisfy Section 73.315, therefore satisfies the Commission's requirements on its face. ORA's Motion offers no evidence that Wilburn's station will not provide

city-grade coverage and, indeed, does not even allege that Wilburn's proposed coverage of the community will fall short. The Motion thus fails to justify the addition of the requested issue. The Motion thereby also contravenes Section 1.229(d) of the Rules, which requires movant to supply "specific allegations of fact sufficient to support the action requested," supported by affidavits or other reliable evidence of such facts. In view of the patent inadequacy of ORA's Motion, its request for a city coverage issue must be denied.¹

In any event, to the extent that a question may nevertheless have been raised simply because a statement of 80% coverage was not included in Wilburn's application, such statement has now been obtained from Wilburn's consulting engineer and is attached hereto. At this point, therefore, whatever question may have been raised by ORA has been mooted.

2. Short-Spacing to WTTX-FM

ORA's Motion argues -- once again -- that a question is raised about Wilburn's basic qualifications because the transmitter of its proposed station will be closer to Station

¹ The cases cited by ORA, Port St. Lucie Broadcasting, 6 FCC Rcd 2063 (MMB 1991), and Pearce Broadcasting Partnership, 6 FCC Rcd 5775 (MMB 1991) lend no support to its Motion. In the former case, an issue was specified in light of a dispute about the actual extent of the community's boundaries; in the latter case, an engineering study (which was not proffered by ORA in this case) revealed that, contrary to the applicant's claim, the city-grade signal would cover only 69% of the community. See, 6 FCC Rcd at 2065 and 6 FCC Rcd at 5775.

WTTF-FM, Tiffin, Ohio, than the distance specified by Section 73.207 of the Commission's Rules. It contends that the "North Texas Media policy"² requires such qualifying issue where one applicant's facility will meet the spacings called for by Section 73.207 and grant of another applicant's proposal would require waiver of the Commission's rules. According to ORA, Section 73.213 of the Rules, which authorizes Wilburn's technical proposal notwithstanding what would be "short-spacing" under Section 73.207, is "merely a standardized procedure to obtain a waiver of the spacing requirements" (Motion, p.2).³ ORA alleges that a qualifying issue must be specified to determine whether Wilburn's technical proposal is inferior to that of ORA, which proposes to operate with greater power at a "fully-spaced" site.

ORA's Motion must be denied in this respect, as well. As an initial matter, ORA previously has alleged that Wilburn's application could not be granted for the reasons now advanced in its Motion, and its argument was addressed and expressly rejected by the Hearing Designation Order of this proceeding. It

² North Texas Media. Inc. v. FCC. 778 F.2d 28 (D.C. Cir.

therefore is improper for ORA to again raise it before the presiding Judge. Atlantic Telecasting Co., 5 FCC 2d 717 (1966).⁴

Moreover, whether or not the North Texas Media line of cases mandate the specification of an appropriate issue when waiver of a Commission policy is required, Wilburn's application does not require such waiver before it may be granted. As evident on the face of Section 73.213, as dictated by common sense (i.e. that compliance with the terms of a rule does not entail a waiver of a rule) and as explained by the HDO, this simply is not a case where the issue of a waiver and precedent pertaining to such waivers are pertinent.⁵

Finally, to the extent that ORA believes that its stronger signal and "fully-spaced" facilities are to be preferred to the technical proposal set forth in Wilburn's application, that matter already is encompassed within the specified "areas and

⁴ As recognized by the Judge when he denied ORA's earlier Motion to Certify, the HDO rejected ORA's interpretation of the Commission's rules, holding that Wilburn's application was acceptable, that no waiver of the rules is necessary and that no question was raised by ORA with regard to Wilburn's qualifications to receive the permit for which it has applied. ORA's claim in its Motion that it is raising the issue for the first time (Motion, p.2) is sheer sophistry.

⁵ Similarly, On the Beach Broadcasting, FCC 93-211, released May 10, 1993, is inapposite. That case did not involve applications which were acceptable under Section 73.213, but instead addressed the issue whether a waiver of Section 73.207 was justified in the circumstances of that case. By citing this case, ORA merely demonstrates, once again, that it fails to understand the difference between the waiver of one rule and compliance with another rule.

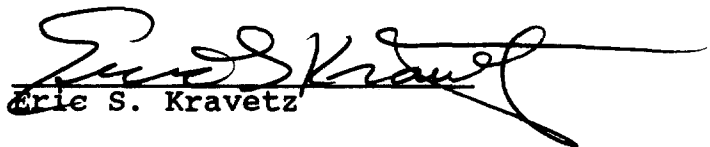
populations" inquiry under the comparative issue. There is no legal or logical foundation, however, for ORA's attempt to convert what may (or may not) be a preference under the comparative issue into an absolutely disqualifying issue which would render meaningless all of the other comparative attributes of the applicants.

In sum, ORA lacks both a factual and legal foundation for the two issues sought in its Motion. The Motion therefore should promptly be denied.

Respectfully submitted,

WILBURN INDUSTRIES, INC.

By:


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June 2, 1993

Its Attorneys

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STATEMENT OF JOHN MCKINLEY

John McKinley hereby states as follows:

As President of Ohio Broadcast Consultants, Inc., I acted as technical consultant to Wilburn Industries, Inc. and prepared the engineering section of its application to operate an FM station on Channel 280A at Westerville, Ohio, using the facilities of former station WBBY-FM. Ohio Broadcast Consultants, Inc. also was a consultant to the licensee of WBBY-FM and prepared the application which requested authority from the FCC to construct those facilities.

As I noted in the materials which I prepared for Wilburn Industries, the proposed city-grade contour of the station did not encompass 100% of the Westerville city limits. As stated in the application, however, the proposal satisfied the requirements of Section 73.315 of the Rules and no waiver was required. This was because I had determined that over 80% of the city was covered by a city-grade signal so that, under Commission policy, the requirements of the rule were satisfied.

I hereby affirm under penalty of perjury that the above statement is true and correct, to the best of my knowledge.

Executed this 2nd day of June, 1993.



John M. McKinley

CERTIFICATE OF SERVICE

I, Beverles Jenkins, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 2nd day of June, 1993, I have caused to be mailed U.S. mail, postage prepaid, a copy of the foregoing "Opposition to Petition to Enlarge" to the following:

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